

**BEFORE THE GRIEVANCE COMMISSION OF  
THE SUPREME COURT OF IOWA**

	)	
Iowa Supreme Court	)	
Attorney Disciplinary Board,	)	Docket Number 833
	)	
Complainant,	)	
v.	)	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED SANCTIONS</b>
	)	
Kenneth J. Smith,	)	
	)	
Respondent.	)	

**I. PROCEDURAL BACKGROUND**

Hearing on this matter took place April 3, 2017.

The Iowa Supreme Court Disciplinary Board was represented by attorney Patrick O'Bryan. Respondent Kenneth J. Smith was represented by David Brown, from Hansen, McClintock, and Riley.

The Division Panel consisted of the following members: Erika Eckley (Division President), Janet Burkhead, Kristina Stanger, Mollie Pawlosky, and Luke Behaunek.

In advance of the hearing, both parties submitted witness and exhibit lists pursuant to the prehearing order. Copies of the exhibitis introduced at the hearing are included in the record for the Court's de novo review.

Witnesses included Gerald Murphy and Kenneth Smith.

Both parties submitted post-hearing briefs upon the conclusion of the hearing. The Board's Brief was filed on April 26, 2017. Respondent's Brief was filed May 16, 2017.

## **II. FINDINGS OF FACT**

The respondent, Kenneth Smith, has been licensed to practice law in Iowa since 1973. (Exh. 3, ¶ 2). He currently practices in Newton as a successor to two law firms that had merged. He is responsible for the IOLTA account for the firm, Updegraff & Smith. He continued what he understood to be the bookkeeping practices and procedures in place from the previous firms. His accounting system at the time of the concern consisted of handwritten ledger cards for clients with some additional information entered into an accounting software program. (Exh. 3, ¶ 14). He utilized the accounting services of Sherry Griggs of Dimensions Accounting, an outside bookkeeper who resides in the same office building as Smith. Smith did delegate some of his financial duties to members of his office staff and Ms. Griggs. (Exh. 3, ¶ 10).

On June 5, 2013, Gerald Murphy, an auditor from the Client Security Commission, performed an audit on the firm's client trust account. During this audit, Murphy concluded there was a shortage of client funds of approximately \$47,365.95, dating back to August 15, 2012. (Exh. 1). Smith wrote a check to cover the potential shortage. (Exh. 2, p. 4).

Additional review showed an additional shortage of \$813.11. (Exh. 1). Smith wrote a check for this amount, as well as an additional \$100 surplus. (Exh. 2, p 5).

After some review, the shortage appeared to have been caused by five accounts: Agro-Ray, L.L.C., Smith-Kriegel, Smith Farms, Smith-Klassen, and an "unknown" account. (Exh. 1); (Exh.2, p. 51); (Tr. 214-216). These accounts were real estate transactions in which Smith was involved and included personal funds belonging to Smith that had not been disbursed after the transactions were complete. (Exh. 2, p. 59). These accounts showed negative balances at the time of the audit. (Exh. 2, pp. 51 & 55).

Smith did eventually withdraw the \$50,000 he had deposited in the account, but whether this was because the records were sorted out eventually or because he earned the fees from another client matter, the record was unclear of exactly what transpired.<sup>1</sup> Millions of dollars go through the trust account annually. (Exh. 3, ¶ 26).

In addition, from 2010 through 2013, Smith filed his required Iowa Annual Client Security Commission Questionnaire stating that he had completed his monthly reconciliations of his trust account. (Exh. 3, ¶ 28). Smith testified that he believed his reconciliations were adequate until the audit revealed the errors.

No evidence of any harm to Smith's clients was presented as a result of the account discrepancies. (Tr. 235). Smith testified he has taken corrective measures to ensure appropriate account reconciliation procedures are followed. *See e.g.*, (Exh. 8) (monthly mandatory reconciliation procedure form).

### **III. CONCLUSIONS OF LAW**

The Board must prove attorney misconduct by a convincing preponderance of the evidence. This burden is less than proof beyond a reasonable doubt, but more than the preponderance standard generally applied in civil cases. *Iowa Supreme Court Attorney Disciplinary Bd. v. Dunahoo*, 730 N.W.2d 202, 205 (Iowa 2007) (citations omitted).

#### **Audit Findings**

The Board alleges Smith violated Iowa Court Rule 45.2(3)(a) in his "failures to do monthly reconciliations in handling his client trust account and his failure to balance his trust

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<sup>1</sup> An account named "El Sombrero" provided additional funds into the trust account, but these funds appear to have been deposited after the negative balance would have been evident with a reconciliation process, but before the audit occurred. (Tr. 246-47).

account bank statements with individual client balances on a monthly basis.” (Amended Complaint, ¶ 5).

Iowa Court Rule 45.2(3)(a) requires lawyers to maintain current financial records regarding their client trust accounts. Lawyers must keep appropriate records and perform monthly account reconciliations. Iowa Ct. R. 45.2(3)(a)(9).

In this matter, there is no dispute whether the respondent, Kenneth Smith, failed to properly reconcile his trust account records. Smith admitted that he did not “perform reconciliations of his client trust account bank statements with his client ledgers each and every month” in 2010, 2011, 2012, or 2013. (Exhibit 4, Requests 1-4). He did not take corrective actions regarding the negative account balances in the trust account until after the audit in June 2013. (Exh. 3, ¶ 21).

“Factual matters admitted by an attorney in an answer are deemed established, regardless of the evidence in the record.” *Iowa Supreme Court Attorney Disciplinary Bd. v. Eslick*, 859 N.W.2d 198, 201 (Iowa, 2015) (quoting *Iowa Supreme Court Attorney Disciplinary Bd. v. Nelson*, 838 N.W.2d 528, 532 (Iowa 2013)).

The Court has previously found a violation of Rule 45.2(3) when an attorney admitted she did not maintain the journals or ledger records and did not perform monthly reconciliations. *Id.* Likewise, with the admission of Smith, the Commission finds the Board has proven a violation of Iowa Court Rule 45.2(3).

### **Security Commission Filings**

The Board alleges Smith engaged in conduct involving misrepresentation by stating in the answers to his annual client security questionnaires in 2010-2013 that he performed monthly

“reconciliations of [his] trust account balances with bank statement balances and individual client ledger balances.”

It is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Iowa R. Prof'l Conduct 32:8.4(c). Misrepresentation requires proof of intent to deceive. *Iowa Supreme Court Attorney Disciplinary Bd. v. Thomas*, 794 N.W.2d 290, 294 (Iowa 2011). “The Board must prove the attorney acted with some level of scienter greater than negligence.” *Iowa Supreme Court Attorney Disciplinary Bd. v. Kersenbrock*, 821 N.W.2d 415, 420-21 (Iowa, 2012) (citing *Iowa Supreme Court Attorney Disciplinary Bd. v. Netti*, 797 N.W.2d 591, 605 (Iowa 2011)).

While Smith admitted in the record that he failed to properly reconcile his trust account and balances every month, he testified at the hearing that he believed he was providing sufficient reconciliation processes and procedures at the time they were filed.<sup>2</sup> He testified that it was not until the June 2013 audit that he became aware there was a third level of scrutiny required for an appropriate reconciliation and that it was this failure to perform the third level of reconciliation that was the reason his answers were incorrect. He explained that he was not aware that he was supposed to reconcile each and every client account card with the bank statement and trust account ledger each month. It was this missing piece that resulted in the deficiencies identified in the audit. (Tr. 158-176).

The Commission finds in this record that while the explanation by Smith regarding his belief that he was performing appropriate reconciliations shows a high level of negligence on his part, the evidence presented by the Board did not rise to the level of fraud or misrepresentation.

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<sup>2</sup> The Panel seems a bit perplexed about how an individual who “technically” has a master’s in finance is unaware of appropriate account reconciliation processes, there was no evidence, however, presented to the contrary by the Board. *See* (Tr. 90-91).

As such, the Commission does not find a violation of Iowa Rule of Professional Conduct 32:8.4(c) has been established.

#### **IV. FACTORS DETERMINING SANCTION**

“There is no standard sanction for particular types of misconduct. While prior cases are instructive, we craft an appropriate sanction in light of each case's unique circumstances.” *Iowa Supreme Court Attorney Disciplinary Bd. v. Hearity*, 812 N.W.2d 614, 622 (Iowa 2012) (quoting *Iowa Supreme Court Attorney Disciplinary Bd. v. Boles*, 808 N.W.2d 431, 441 (Iowa 2012)). When determining a sanction, consideration is given to the type of violation that occurred, deterrence for attorneys, protection of the public, and the need to maintain the reputation of the profession. Aggravating and mitigating circumstances are also considered in determining a sanction and any mitigating or circumstances. *Eslick*, 859 N.W.2d at 202.

##### *Mitigating Factors*

The Commission finds the following mitigating factors are in Smith’s favor. Smith has no prior history of discipline during his long tenure as an attorney. Further, there was no evidence that any clients were actually harmed as a result of the failure to appropriately reconcile the trust account during this period.

Lastly, while Smith continued to insist that the rules regarding reconciliation were a surprise and new and not adequately known by attorneys, he did admit his failure to appropriately reconcile his account, and he cooperated fully during the proceedings. “Even though ‘we ... expect cooperation with, and candid responses to, commission auditors,’ remorse and cooperation generally mitigate our sanction.” *Id.* at 203-04 (quoting *Iowa Supreme Court Attorney Disciplinary Bd. v. Qualley*, 828 N.W.2d 282, 294 (Iowa 2013) “So, too, does the fact that no clients were harmed.” *Id.* at 203 (citing *Iowa Supreme Court Attorney Disciplinary Bd. v.*

*Marks*, 831 N.W.2d 194, 202 (Iowa 2013); *Kersenbrock*, 821 N.W.2d at 422; *Iowa Supreme Court Attorney Disciplinary Bd. v. Van Ginkel*, 809 N.W.2d 96, 110 (Iowa 2012)).

Lastly, significant evidence was presented of the charitable work done by Smith in his community throughout his legal career. “Although we consider this evidence when determining the appropriate sanction, the character testimony neither excuses nor reduces the seriousness of the unethical conduct.” *Iowa Supreme Court Attorney Disciplinary Bd. v. Allen*, 586 N.W.2d 383, 390 (Iowa 1998).

#### *Aggravating Circumstances*

The Commission, however, notes that Smith does have extensive experience in the practice of law. He has practiced law for forty-four years and has been with the same firm in Newton since 1973. *See, e.g. Iowa Supreme Court Attorney Disciplinary Bd. v. Dunahoo*, 730 N.W.2d 202, 207 (Iowa 2007) (aggravating factor was that attorney practiced law for approximately thirty-five years and operated own firm for twenty-five years prior to discipline); *see also Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Vinyard*, 656 N.W.2d 127, 131 (Iowa 2003) (20 years); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Gallner*, 621 N.W.2d 183, 188 (Iowa 2001) (“experienced lawyer who practices extensively in the area”); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Wagner*, 599 N.W.2d 721, 730 (Iowa 1999) (16 years)).

#### **Past Cases Imposing Similar Discipline**

“When an attorney's minor trust account violations are the result of sloppiness or lack of oversight, we have levied a public reprimand rather than a suspension.” *Iowa Supreme Court Attorney Disciplinary Bd. v. Lubinus*, 869 N.W.2d 546, 550-51 (Iowa 2015) (describing *Iowa*

*Supreme Court Board of Professional Ethics & Conduct v. Apland*, 577 N.W.2d 50, 56, 59–60 (Iowa 1998) (sanctioning public reprimand for “lackadaisical bookkeeping practices).

In *Iowa Supreme Court Attorney Disciplinary Board v. Piazza*, the attorney was publicly reprimanded for failing to deposit an advance fee into his trust account and provide an accounting to his client. 756 N.W.2d 690, 697–98 (Iowa 2008). That attorney had not had any prior discipline and had reformed his billing and accounting practices to avoid a recurrence of the issue. *Id.* at 700.

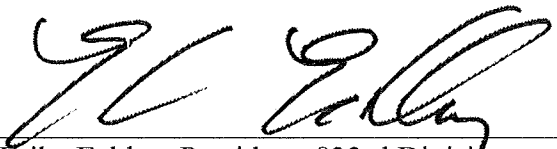
A public reprimand might be sufficient sanction if there are minor ethical violations, standing alone. *Kersenbrock*, 821 N.W.2d at 422 (citing *Denton*, 814 N.W.2d at 551 (public reprimand warranted for trust account violation); *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Sobel*, 779 N.W.2d 782, 789–90 (Iowa 2010) (public reprimand for trust account violation); *Iowa Supreme Ct. Bd. of Prof’l Ethics & Conduct v. Herrera*, 560 N.W.2d 592, 595 (Iowa 1997) (public reprimand for failing to maintain adequate records and mismanagement of client funds); *Comm. on Prof’l Ethics & Conduct v. Morris*, 505 N.W.2d 194, 195–96 (Iowa 1993) (holding public reprimand warranted for attorney who “knowingly misled the client security and disciplinary commission by falsely certifying the status of his trust accounting procedures on annual reports”)).



### **Sanction**

Smith admitted his conduct violated Iowa Rule Iowa Court Rule 45.2(3)(a) as set out in the Complaint. In reviewing the past sanctions imposed for similar lapses of oversight, and, in light of these violations, the protection of the public, the duty to uphold the integrity of the profession in the eyes of the public, as well as the mitigating and aggravating factors, the Commission concludes a public reprimand is warranted.

Dated this 11th day of July, 2017.



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Erika Eckley, President, 833rd Division  
Iowa Supreme Court Grievance Commission